

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FIMBANK PLC,)	CASE NO: 2:19-CV-00264
)	
Plaintiff,)	CIVIL
)	
vs.)	Corpus Christi, Texas
)	
DISCOVER INVESTMENT CORP,)	Wednesday, November 13, 2019
ET AL,)	
)	(2:47 p.m. to 4:17 p.m.)
Defendants.)	(4:32 p.m. to 4:57 p.m.)

HEARING

BEFORE THE HONORABLE B. JANICE ELLINGTON,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: See page 2

Court Reporter: Recorded; FTR

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APPEARANCES:

For Plaintiff:

ANDREW R. NASH, ESQ.
Phelps Dunbar
500 Dallas, Suite 1300
Houston, TX 77002

EDWARD W. FLOYD, ESQ.
Floyd Zadkovich
215 Park Ave. South, 11th Floor
New York, NY 10003

ANDREW NASH, ESQ.
Phelps Dunbar
500 Dallas St., Suite 1300
Houston, TX 77002

For Defendants:

JAMES F. BUCHANAN, ESQ.
Welder Leshin
800 N. Shoreline Blvd.
Suite 300 North Tower
Corpus Christi, TX 78401

MICHAEL J. WRAY, ESQ.
CHRISTOPHER R. HART, ESQ.
Holman Fenwick Willan
5151 San Felipe, Suite 400
Houston, TX 77056

1 Corpus Christi, Texas; Wednesday, November 13, 2019; 2:47 p.m.

2 (Call to Order)

3 THE COURT: All right, good afternoon. I'm going to
4 call Case Number C-19-cv-264; FIMBank PLC versus Discover
5 Investment Corporation et al.

6 May I have appearances, please?

7 MR. FLOYD: Good afternoon, your Honor. Edward
8 Floyd, from the Floyd Zadkovich firm, for the Plaintiff.

9 And with me --

10 MR. NASH: Andrew Nash, from Phelps Dunbar, for the
11 Plaintiff.

12 THE COURT: I'm sorry. You're Andrew --

13 MR. NASH: Nash.

14 THE COURT: -- Nash.

15 MR. BUCHANAN: Good afternoon, your Honor. Jim
16 Buchanan, from Welder Leshin, in Corpus Christi, on behalf of
17 SPV SAM Eagle, Inc.

18 And I am joined by Mr. Michael Wray and Mr. Chris
19 Hart, from the firm of Holman Fenwick Willan, in their Houston
20 office.

21 THE COURT: Okay, and who is going to be arguing
22 primarily today on behalf of the Plaintiff?

23 MR. FLOYD: That would be I, your Honor.

24 THE COURT: Mr. Floyd?

25 MR. FLOYD: Yes.

1 **THE COURT:** And then, mister --

2 **MR. BUCHANAN:** Mr. Hart and Mr. Wray will both be
3 arguing on behalf of SPV SAM Eagle.

4 **THE COURT:** Okay, and Mr. Nork, you mean?

5 And who's arguing on -- I'm sorry. Who's arguing on
6 behalf of the Defendant?

7 **MR. WRAY:** Your Honor, this is Michael Wray. Myself
8 and Mr. Hart will be splitting the argument.

9 **THE COURT:** Oh, okay. It's the Ray; W-r-a-y?

10 **MR. WRAY:** Yes, your Honor.

11 **THE COURT:** Okay. All right, sorry. You can be
12 seated. Thank you.

13 All right. So I guess everybody agrees that the
14 burden is going to be on the Plaintiff in this hearing?

15 **MR. FLOYD:** Yes, your Honor.

16 **THE COURT:** Okay, but it's the Defense motion.

17 But let me hear from the Defense, first, on the
18 motions, and then we'll hear from the Plaintiff.

19 **MR. WRAY:** Thank you, your Honor.

20 **THE COURT:** Mr. Wray?

21 **MR. WRAY:** Good afternoon, your Honor. Michael Wray
22 on behalf of Defendant SPV SAM Eagle.

23 In this argument, I'm going to handle the
24 introduction, I want to address the burden of proof and the
25 mis-delivery claim.

1 Mister -- then I'll turn to Mr. Hart, who will come
2 up and address the alter ego issues.

3 Then I will -- then he's going to flip it back to me
4 to address the fraud and do a summation.

5 **THE COURT:** Okay.

6 **MR. WRAY:** So why are we here today? FIMBank has
7 asserted a *quasi in rem* claim against the -- and attached the
8 SPV SAM Eagle vessel.

9 The vessel is owned by SPV SAM Eagle, Inc.

10 They've attached the vessel as a form of security for
11 a loan in arbitration against a third-party, Discover
12 Investment Company, arising out of the carriage of grain aboard
13 the M/V NIKA, to Egypt, in 2018.

14 What we think the evidence shows is FIMBank -- they
15 finance merchants and traders. They made a bad loan to a
16 company called, "AOS."

17 AOS was the company that was going to buy this grain
18 in the Ukraine and sell it in Egypt.

19 FIMBank sued AOS, obtained a \$20 million judgment in
20 the Dubai courts. And we're here today because they can't
21 enforce it. The problem is, they've attached the wrong vessel.

22 The M/V NIKA, the vessel that actually carried the
23 grain and delivered it to Egypt -- owned by Discover Investment
24 Company -- is an active vessel.

25 There's a live *in-rem* claim against the NIKA, now

1 called, "The Nord." That's the vessel that FIMBank should have
2 arrested.

3 In fact, the evidence they put in to the Court shows
4 that they tracked the vessel's movement and they're perfectly
5 capable of arresting that ship any time they want.

6 So we're here today because a vessel owned by a third
7 party, that had nothing to do with the underlying transaction,
8 was attached based upon a rather thin veil-piercing theory.

9 **THE COURT:** Okay, wait. But I understand that, I
10 think.

11 **MR. WRAY:** Uh-huh.

12 **THE COURT:** Now, who was -- who did I talk to at the
13 *ex parte* hearing? Was it Mr. Nash?

14 **MR. NASH:** Yes, your Honor.

15 **THE COURT:** Okay, and as I recall, I asked, "Is this
16 a maritime claim or an admiralty claim?" And you said, "No."
17 Is that right?

18 There wasn't any intention to prove that there was a
19 connection of the vessel we have arrested with the underlying
20 claim; just that the vessel is owned by the same people.

21 Did I get that right?

22 **MR. NASH:** Not entirely, your Honor.

23 **THE COURT:** Okay, you'll have to put up with me. I'm
24 sorry. I just want --

25 **MR. WRAY:** Of course, your Honor.

1 **THE COURT:** -- to understand this.

2 **MR. NASH:** So the -- first of all, it is a maritime
3 claim.

4 Second of all, the vessel that is attached, the M/V
5 Sam Eagle --

6 **THE COURT:** But it was never the NIKA?

7 **MR. NASH:** That is correct.

8 **THE COURT:** That's right. Okay, so that was the
9 whole point.

10 It wasn't the NIKA and it wasn't proceeding -- I
11 understand what you mean about being a maritime claim. But it
12 was never an attempt to say the NIKA was the Sam Eagle, right?

13 Okay, so I just want to understand. Go ahead.

14 Thank you. You may be seated.

15 Go ahead, Mr. Wray.

16 **MR. WRAY:** And, your Honor, I think you seized a very
17 important point.

18 These are separate vessels owned by separate and
19 distinct companies.

20 Now, as your Honor mentioned earlier, it is -- this
21 is a show cause hearing, under Rule (E)(4)(f). The Plaintiff
22 has the burden of proof -- in this case, FIMBank -- that they
23 had to come forth with competent evidence that there are
24 reasonable grounds to maintain the attachment.

25 This is more than just a notice-pleading standard

1 under Rule 8. So what they have to show today -- as we sit
2 here today, the evidence in the record -- that they are legally
3 entitled to maintain this attachment.

4 Now, Rule (b) is strictly construed, because it
5 deprives people of their property.

6 In this case, the vessel Sam Eagle has been -- the
7 owners have been deprived of property for over two months.

8 So the reasonable ground standards is that it's more
9 likely than not that the alleged facts are true. It's a
10 heightened pleading standard, which we don't think they can
11 meet today.

12 Now, what hurdles does FIMBank have to overcome
13 today?

14 Well, Rule B itself -- which they proceeded under --
15 requires a very -- a maritime claim supported by a verified
16 pleading.

17 In this case, the maritime claim they've identified
18 is the alleged mis-delivery of cargo, carried by the NIKA, in
19 2018, in Egypt. That's the first hurdle.

20 The second hurdle is, under this Circuit's case law,
21 they have to show that the Sam Eagle -- sitting here in Corpus
22 Christi Bay -- is the property of Discover Investment.

23 Now, the way they have alleged it, at least
24 initially, was that there was a company called, "SAM Geneva,
25 slash, SAM Panama," dominating control of Discover and, in

1 turn, dominating and controlled SPV SAM Eagle.

2 So they have a double veil-piercing standard to show
3 that the property, here in Texas, is actually Discover
4 Investments' property.

5 So, first thing, all -- if they have to meet their
6 alter ego factors -- and those alter ego factors must have
7 existed at the time of the underlying grain carriage, in 2018.

8 And the second legal requirement in a veil-piercing
9 hearing -- analysis, in this Circuit, is that the corporate
10 form must have been used to commit a fraud or wrongdoing or
11 injustice at the time of the underlying transaction

12 Now, that's quite a few hurdles they have to come
13 through. And what have -- what evidence have they actually
14 brought forward to this Court?

15 Well, their initial verification, executed by
16 FIMBank's general Counsel, an interested witness -- admits that
17 half the facts in the petition were upon information and belief
18 and they lacked personal knowledge, particularly dealing with
19 the veil-piercing allegations.

20 They put in a declaration, from their trial Counsel,
21 summarizing a conversation he had with a SAM Geneva employee,
22 who left in 2014, four years before the transaction of issue --
23 which is nothing but hearsay.

24 And they put copious amounts of pronouncing theories
25 of maritime databases, particularly Equasis. What I find

1 interesting about those databases is they all have disclaimers.
2 The information here is not reliable. They disclaim
3 responsibility for it and it shouldn't be used.

4 So one of the -- as an example -- this is on Equasis'
5 website, which I looked at this morning. They refer to data
6 from the IHS maritime. And the disclaimer for that company is,
7 "IHS data must never be used for commercial purposes or to
8 produce a commercial product or service."

9 So they have hearsay upon hearsay. Google pronounce
10 and the declaration of a ship broker has no personal knowledge
11 of any of the transactions.

12 So given the standard of the burden of proof they
13 have today and the evidence they've -- we think our briefing
14 more than shows that evidence is incompetent to maintain their
15 burden.

16 Now, turning to the mis-delivery claim, (indisc.)
17 procedural mechanism. The Fifth Circuit, in the Alphamate
18 decision, clearly identifying that to support a marine
19 attachment, you have to have an underlying maritime claim.

20 And without a valid maritime claim, there cannot be
21 an attachment. In other words, what maritime contract today
22 has a FIMBank (indisc.)?

23 Well, they weren't the charterers of the NIKA; they
24 weren't the shippers of the cargo; they weren't the consignee
25 of the cargo.

1 What FIMBank has identified is that they were holders
2 of a bill of lading for this grain. And they held it as
3 security for the loan they made to AOS.

4 Now, the simple fact of being a holder of a
5 negotiable instrument -- in this case, the bill of lading
6 served as a title document, because these were two order bills.

7 Two order bills was, anybody who had a copy of that
8 two order bill could go to the warehouse in Egypt and request
9 the cargo.

10 So while they talked about, "We have these bills of
11 lading; we had the bills of lading," they never say what the
12 ship did wrong in Egypt.

13 They state it's their position the cargo was mis-
14 delivered, but there was no facts alleged in the complaint that
15 says how, to who, what happened to this cargo, or how did the
16 vessel tender the cargo to somebody who is not lawfully
17 entitled to receive it.

18 In fact, the law actually requires that the vessel
19 owner tender the cargo to a holder of an order bill.

20 And that's supported by (indisc.) partners case,
21 cited in our brief.

22 So what information have they put forth in the record
23 to support the mis-delivery claim?

24 FIMBank had original bills of lading. FIMBank then
25 transmitted those original bills of lading to a bank in Egypt,

1 called, "BLOM Bank," which then asked BLOM Bank not to release
2 the bills of lading until FIMBank got paid.

3 So by tendering those bills of lading, they've
4 released their security interest. And if BLOM Bank didn't do
5 their job and gave those bills of lading to third parties in
6 Egypt to collect the cargo, that's an issue between BLOM Bank
7 and FIMBank; it's between FIMBank and AOS. Has nothing to do
8 with the ship.

9 So we think a glaring omission from their complaint
10 is, when did the ship do wrong?

11 Others going to say, it's our position it was mis-
12 delivered. Well, that's a legal conclusion. It's our position
13 that the attachment shouldn't be -- should be vacated. But the
14 Court has to look at the pleadings and the evidence to make
15 that determination.

16 So, in short, we think that the first hurdle that
17 there's a valid maritime claim for mis-delivery fails. And
18 without that, the whole house of cards collapses.

19 And with that point, your Honor, I'll turn now to my
20 colleague Mr. Hart, who will address the alter ego factors.

21 **THE COURT:** Okay, Mr. Hart?

22 **MR. WRAY:** Thank you, your Honor.

23 **MR. FLOYD:** Your Honor, may I ask, just in the
24 interest of simplicity, if I could address those parts now? It
25 just may move things along and keep things orderly.

1 **THE COURT:** Well, all right. I'll give you a chance.
2 We'll see. I just want to -- I was -- I need to
3 understand all of this.

4 **MR. FLOYD:** Understood, your Honor. Thank you.

5 **THE COURT:** All right, why don't you go ahead --

6 **MR. FLOYD:** Thank you, your Honor.

7 **THE COURT:** -- Mr. Floyd.

8 **MR. FLOYD:** I may not go in the same order as my
9 adversary did there. But there were a number of points that he
10 raised that I just thought should be addressed at the outset
11 here.

12 First of all, regarding the nature of Rule B in the
13 requirements for obtaining a Rule B attachment, I don't think
14 that there's any dispute regarding the law on that.

15 There's four prongs or four elements to the analysis.

16 First, that the Plaintiff has alleged a *prima facie*
17 valid maritime claim; second, that the Defendant or Defendants
18 cannot be found within the Federal District; third, that the
19 Defendan, or Defendants' property can be found here; and,
20 fourth, that there are no statutory or maritime law bars to the
21 attachment.

22 My understanding of the motion is that the only prong
23 that's being challenged here today is the first one; whether or
24 not the Plaintiff has asserted alleged a *prima facie* valid
25 maritime claim.

1 And that's being attacked on two grounds -- or two
2 angles; the first being the underlying dispute, and the second
3 one being the alter ego allegations.

4 For point of clarification, when I say, "underlying
5 dispute," what I'm referring to there is the underlying dispute
6 between FIMBank, as the holder in due course of original bills
7 of lading, and the owner of the NORD -- which is the vessel's
8 name now; formally known as the ex-NIKA, which is what it was
9 called as of early 2018, when this voyage was performed,
10 carrying wheat from Russia to Egypt.

11 That underlying dispute concerns a claim for mis-
12 delivery of cargo. That claim is already subject to
13 arbitration in England, pursuant to an arbitration agreement.

14 There's some dispute over there as to which contract
15 governs the precise terms in the body of arbitration, as I
16 understand it. But --

17 **THE COURT:** Let me just stop you for just a minute.

18 Was Counsel correct when he said that -- what I want
19 to know is, is there a case -- if you're disputing whether or
20 not there's a maritime claim, I don't think anybody's disputing
21 that the claim against the NIKA, that's in arbitration -- no
22 one's claiming that's not a maritime claim; is that right?

23 **MR. WRAY:** Your Honor, the claim in arbitration
24 against the NICA is in Europe.

25 **THE COURT:** Okay. Okay, so if the claim in

1 arbitration is a maritime claim and -- so what I need is not
2 the facts of the case.

3 What I really need from you is a case that says that
4 that kind of a dispute can be used to -- as the basis for a
5 maritime attachment. Now, does that then go strictly to the
6 alter ego argument?

7 **MR. WRAY:** If I may, my colleague (indisc.). A
8 maritime -- they have to put forth a valid maritime claim,
9 initially, to support a moving attachment here in the U.S.

10 **THE COURT:** Right, right.

11 **MR. WRAY:** Alphamate, the case that directs that
12 specifically with the Court -- what was at issue?

13 Was it a maritime claim or was it not a maritime.
14 That was also a grain or commodities trading contract that had
15 a vessel involved.

16 And the Fifth Circuit said, "No, given the facts of
17 that case, there was no maritime claim." So, therefore, the
18 attachment fell through.

19 We do not see it here today. They've articulated a
20 valid maritime claim purely based on (indisc.) as a holder of a
21 bill of lading.

22 **MR. FLOYD:** But Alphamate -- it's been a while since
23 I've read the case.

24 **THE COURT:** Okay.

25 **MR. FLOYD:** I've read a number of times.

1 **THE COURT:** Okay, go ahead, mister --

2 **MR. FLOYD:** Alphamate was a claim arising from a
3 sales contract -- purchase and sales contract.

4 And the issue there was whether -- or whether it was
5 on FOB terms or CIF terms -- whether a sale contract that
6 contains some maritime terms in it, such as "demurrage" or who
7 pays for the shipping, *et cetera* -- whether that can arise to
8 being a maritime contract.

9 And the Fifth Circuit held, in Alphamate, that a sale
10 contract is not a shipping contract and is not a maritime
11 contract. However, that has absolutely nothing to do with a
12 bill of lading.

13 A bill of lading is most certainly -- depending upon
14 who holds it, a bill of lading is a maritime contract.

15 Bills of lading -- and I think it's pretty
16 axiomatic -- served several purposes. One, they're a document
17 of title; one, they're a receipt of the goods by the ship; and
18 the third one, when a bill of lading is held by somebody who is
19 not the charterer of the vessel, then in their hands, that bill
20 of lading is the contract of carriage.

21 In this situation here, the bill of lading went to --
22 actually, the 61 bills of lading; and about 20-some of those
23 are at issue.

24 The bills of lading went to FIMBank. FIMBank held
25 them as a holder in due course because it was financing the

1 underlying trade.

2 FIMBank sent those bills of lading on out for
3 collection, as it's termed in the industry, meaning that the
4 bills of lading are used to receive payment, and the person who
5 makes payment for the cargo represented by the bill then goes
6 and gets the cargo.

7 In this situation, the bills of lading went on out
8 for collection. Then BLOM Bank -- or BLOM Bank sent those
9 bills -- a number of them -- back to FIMBank and said, "Sorry,"
10 basically. "Cargo's gone, but here's the bills. We didn't get
11 paid, and you're not getting paid."

12 That's a mis-delivery claim there. Something
13 happened to that cargo that it was allowed to go forth without
14 proper presentation of the original bills of lading. But all
15 of that is subject to arbitration in London.

16 The sole point here that matters is that there were
17 bills of lading, bills of lading constitute maritime contracts
18 and the claim or the underlying disputes of the arbitration in
19 London, and London Maritime Arbitration Association rules is a
20 maritime claim.

21 We then shift from clearly having an underlying
22 maritime claim on over to the true issue here, which are -- is
23 the alter ego allegations. That's what's really at issue here.

24 And there's hundreds of cases -- and I've been
25 involved in a good number of them -- recognizing, of course,

1 that if an underlying dispute constitutes maritime dispute,
2 falls within the scope of the Court's maritime jurisdiction,
3 then a claim to enforce that, based upon an alter ego theory of
4 liability, also falls within the Court's maritime jurisdiction
5 and suffices for purposes of the first prong of Rule B; that
6 prong being whether the Plaintiff has set forth a *prima facie*
7 valid maritime claim.

8 On that, mister -- my adversary made some assertions
9 regarding the burden of proof. We are not arguing against the
10 fact that those four prongs, initially, at least, fall on the
11 Plaintiff to properly allege.

12 However, there was an assertion made that
13 evidence, and fully admissible evidence, needs to be presented
14 at this early stage regarding an alter ego claim and
15 demonstrating, by a preponderance, that the alter ego claim is
16 more likely than not to succeed.

17 I do not agree that that is correct. One case cited
18 in our opposition memo would be the White Rosebay decision by
19 Judge Ramos, which, quite specifically, held that all that is
20 required at this early stage is that the allegations in the
21 complaint, together with documents and materials submitted in
22 connection with the so-called Rule 4(e), (4)(f) motion
23 practice -- which is what we're at right now -- can justify or
24 is sufficient to support a reasonable inference that the alter
25 ego allegations are valid and might succeed.

1 I'm sure we'll get to it later on here regarding
2 those allegations and the supporting materials, but we're
3 looking for, solely, a reasonable inference at this point.

4 To say and suggest that FIMBank has to come forward
5 with conclusive evidence at this point to definitively resolve
6 the dispute is precisely contrary to the decision in White
7 Rosebay; in fact, that was expressly rejected in that decision.

8 Instead, it's sufficient information to support a
9 reasonable belief. And what will ordinarily occur thereafter
10 is that because Rule B is inherently a jurisdictional tool --
11 jurisdiction device for establishing *quasi in rem* personal
12 jurisdiction over one or more Defendants.

13 And of course -- and oftentimes said -- and, again,
14 these decisions are cited in our brief -- that, early in a
15 case, disputed allegations of personal jurisdiction can be a
16 bit hazy or fuzzy. It warrants discovery.

17 And to the extent the Court has any doubts regarding
18 the validity and the strength of the allegations to date, I
19 would strongly propose that expedited -- and certainly
20 expedited -- but expedited discovery would be fully appropriate
21 in these circumstances.

22 In my mind, where I think that that would be is
23 expedited discovery concerning the ultimate ownership of each
24 of these companies.

25 I'm pretty certain I know who is the ultimate

1 beneficial owner. And that that would be the same UBO or
2 ultimate beneficial owner identified as a UBO in some of the
3 mortgage documents that we've submitted, a Ms. Irina Pomelova,
4 of Moscow, who owns these companies via a series of offshore
5 companies out of Hong Kong, and then in Panama and elsewhere,
6 including Liberia.

7 But discovery regarding ownership; discovery
8 regarding the insurance -- because as pointed out, in our
9 papers, there's this very shockingly unique situation where
10 Steamship Mutual P&I Club issued sequential renewal notices --
11 renewal numbers two years in a row for each of the ships,
12 including the NIKA and including the SAM -- which we say all
13 fall within --

14 **MR. WRAY:** Your Honor --

15 **MR. FLOYD:** -- the same ownership fleet.

16 **THE COURT:** Yes, sir?

17 **MR. FLOYD:** I'm good.

18 **MR. WRAY:** Mis-delivery plan -- we're just going to
19 the (indisc.).

20 **MR. FLOYD:** I'm good now, sir. You can step up
21 there.

22 **THE COURT:** This was a bad idea.

23 Okay, Mr. Hart, are you going to address alter ego?

24 **MR. WRAY:** Yes, ma'am. I'd like to make one rebuttal
25 point and (indisc.) so we can close that off.

1 **THE COURT:** Well, you're going to confuse me.

2 **MR. WRAY:** That's right.

3 **THE COURT:** I'm just going to hear from everybody --

4 **MR. WRAY:** Then I'll let Mr. Hart --

5 **THE COURT:** And then, if you have anything else you
6 want to say to rebut, then you can do it then.

7 **MR. WRAY:** I'll save it for redirect.

8 **THE COURT:** Because I'm getting confused.

9 Go ahead, Mr. Hart.

10 **MR. HART:** Thank you, your Honor. But what I intend
11 to address are the --

12 **THE COURT:** So what is the problem with ordering some
13 expedited discovery on this issue?

14 You're never going to get me to agree that he has to
15 prove that by a preponderance of the evidence at this point.

16 **MR. HART:** Understand. But under the standards of
17 the Rule E(4)(f) hearing and the Rule B situation with the
18 attachment of property -- that's why this situation is very
19 different from notice pleadings.

20 And it's why the standard that a Defendant --

21 **THE COURT:** I understand that.

22 **MR. HART:** -- the proponent of an attachment --

23 **THE COURT:** I understand that. But --

24 **MR. HART:** -- has to do much more.

25 **THE COURT:** I understand that.

1 But how is the Plaintiff supposed to be able to get
2 that information unless they have a short period of discovery
3 where they can try to take depositions and do all those other
4 things that they do?

5 **MR. HART:** They've actually already come forward with
6 their information, your Honor. And today is the day, at this
7 hearing, that Rule (E)(4)(f) says that the proponent of the
8 attachment has the burden to show why the attachment should not
9 be vacated.

10 And the reason why the --

11 **THE COURT:** No. You've not conducted any discovery
12 at this point.

13 **MR. HART:** And that's why this is -- Rule B is such
14 an exceptional remedy, your Honor. Because it deprives my
15 client --

16 **THE COURT:** I understand that.

17 **MR. HART:** -- of property.

18 **THE COURT:** I understand that. I'm talking about --

19 **MR. HART:** It's an exceptional --

20 **THE COURT:** -- expedited discovery.

21 I'm not talking about letting some period of time
22 pass while the parties are exchanging preliminary motions.

23 **MR. HART:** Understand, your Honor.

24 In the event that expedited discovery is allowed here
25 and goes forward, we would ask that the Court not even

1 entertain that idea, unless the Court also requires FIMBank to
2 deposit money to cover the custodial expenses for keeping the
3 vessel under attachment.

4 The vessel's already been deprived, from SPV SAM
5 Eagle, for two months. It's already been here for two months.
6 And quite a bit of custodial expenses have already been
7 incurred by the vessel.

8 If FIMBank wants more time to conduct a discovery
9 fishing expedition to try to find out what if they might
10 discover some alter ego facts --

11 **THE COURT:** I'm not going to do that.

12 **MR. HART:** -- then they should be entitled.

13 **THE COURT:** I'm not going to do that.

14 You can appeal and go to Judge Ramos. But the
15 Plaintiff -- I mean, the real issue is, why didn't you reduce
16 those costs by posting a bond that you would get back if there
17 was no showing of alter ego?

18 **MR. HART:** Well, here, your Honor, the problem is
19 that the owner of the property is not required to post a bond.

20 And here, that's all their asking for. What they're
21 asking for is a bond to secure --

22 **THE COURT:** Right.

23 **MR. HART:** -- what they hope to be payment,
24 eventually.

25 **THE COURT:** Right. And they have to make a --

1 **MR. HART:** That's all they're --

2 **THE COURT:** -- preliminary --

3 **MR. HART:** -- asking for.

4 **THE COURT:** -- showing of that. And that's why we're
5 having this hearing.

6 And that's why I'm asking, why can't we have a period
7 of discovery for that?

8 **MR. HART:** We would ask the Court not to grant them
9 time for a period of discovery because today --

10 Because, today, what I'm about to explain is why the
11 facts that they have alleged and the evidence that they have
12 brought forward is insufficient for anybody to draw a
13 reasonable inference that they could be successful on proving
14 their alter ego allegations and piercing the corporate veil.

15 What they have alleged is not sufficient.

16 **THE COURT:** Okay, well why don't you go ahead and
17 make your argument, Mr. Hart.

18 **MR. HART:** Thank you, your Honor.

19 What I'm going to do is address the alter ego factors
20 that the Fifth Circuit and the Courts -- District Courts, here,
21 within the Fifth Circuit have applied to these maritime alter
22 ego cases.

23 As the Court is well aware, this is not the first
24 time a Plaintiff has tried to attach somebody else's property
25 under an alter ego theory.

1 **THE COURT:** You can sit wherever you want.

2 **MR. SPEAKER:** Thank you, your Honor.

3 **MR. SPEAKER:** Thank you, your Honor.

4 **MS. SPEAKER:** Judge, do you want to get a chair and
5 put them on top --

6 Can you grab that chair there --

7 **MR. SPEAKER:** Sure.

8 **MS. SPEAKER:** -- and just maybe -- or, yeah, one of
9 the chairs and just put them on top, Judge. Because we --

10 **THE COURT:** Well, because I can't see the -- yeah, I
11 can't see the bottom.

12 **MS. SPEAKER:** Yeah. Is that good for you or --

13 **THE COURT:** I don't know that they'll stay.

14 **MS. SPEAKER:** Oh, okay.

15 **MR. HART:** Your Honor, what I'm holding here is a
16 chart that summarizes some of the information that's in the
17 declaration of Dennis Saevski.

18 **THE COURT:** Uh-huh.

19 **MR. HART:** That's the evidence attached to our reply
20 brief.

21 **THE COURT:** Yes, sir.

22 **MR. HART:** And what that -- what this does is show
23 the separate structure of the ownership -- separate structure
24 of the corporations that own these two vessels.

25 You know, on the right here, we have the M/V NICA,

1 which is the vessel that carried the grain and delivered it in
2 Egypt -- which is the vessel that's the subject of what FIMBank
3 calls its underlying dispute.

4 **THE COURT:** I understand. The SAM Eagle's the thing
5 that's here.

6 **MR. HART:** SAM Eagle's the other ship.

7 **THE COURT:** Nobody's disputing that they're different
8 vessels.

9 **MR. HART:** Understand.

10 They also have different owners, your Honor; the
11 corporations that own them are different. And the ultimate
12 owners are also different sole private investors.

13 Counsel just alleged, in his argument, that he seems
14 to think that the ultimate beneficial owners of each vessels is
15 Ms. Irina Pomelova. I think that's what he just said.

16 Mr. Saevski's declaration demonstrates and proves
17 that that is false.

18 **THE COURT:** Well, I know. But where are the
19 documents to support that?

20 Doesn't he have the right to get the documents to
21 support what's in the declaration?

22 **MR. HART:** I think he does not, your Honor, without
23 more evidence to support any of these alter ego allegations.

24 **THE COURT:** Okay, so your point is, he just doesn't
25 have the right?

1 **MR. HART:** That's right. Because they can't meet any
2 other factors on alter ego allegations, your Honor

3 **THE COURT:** Okay.

4 **MR. HART:** They've got lots of evidence.

5 In fact, this entire notebook -- you know, is a
6 copy -- as the Court's seen, there are many exhibits in their
7 response.

8 And they've got lots of papers, lots of argument --
9 and very confusing argument in their complaint and their
10 response and lots of papers.

11 But what I would like to do is to show the Court that
12 all those papers and all those arguments, they do not meet --
13 they do not raise a reasonable inference of virtually any of
14 these --

15 **THE COURT:** I hate to tell you this, but --

16 **MR. HART:** -- alter ego factors.

17 **THE COURT:** -- I cannot read those. You're going to
18 have to bring it up closer. I'm old.

19 **MR. HART:** (Indisc.).

20 **THE COURT:** Okay, I can see it now.

21 **MR. HART:** So this is a summary. That's why there's
22 so many. Because there are 19 factors from the Fifth Circuit
23 cases that are the guidelines for Courts to consider in
24 deciding whether evidence is sufficient to meet an alter ego
25 veil-piercing theory.

1 So we've listed all 19 of them here to help me
2 remember what they are, to go through them. And they're also
3 listed in our reply brief, your Honor. And what I'd like to do
4 is point out why their evidence really does not even raise a
5 reasonable inference of --

6 **THE COURT:** Okay, wait. Just a minute.

7 **MR. HART:** -- of success on these factors.

8 **THE COURT:** Let me ask.

9 Mr. Floyd, is it your position -- do you agree to the
10 law? Do you agree about the law of alter ego?

11 **MR. FLOYD:** In general, your Honor.

12 **THE COURT:** I'm not talking about the facts; I'm
13 talking about the law.

14 **MR. FLOYD:** Talking about the law of the factors that
15 they've identified are consistent with the factors that Courts
16 have, across the country and also within the Fifth Circuit,
17 most importantly, identified.

18 However, they're always identified as being non-
19 exclusive factors and also identified in connection --

20 **THE COURT:** Okay, but --

21 **MR. FLOYD:** -- with the proposition --

22 **THE COURT:** Okay.

23 **MR. FLOYD:** -- not entered.

24 **THE COURT:** I understand that. But is it -- and it's
25 your -- is it your position that you don't have that all -- any

1 of those things and you need discovery to get it?

2 **MR. FLOYD:** Oh, no, your Honor. We certainly have
3 the allegations and documents to support a good amount of that.

4 But what I'd like to get discovery on is a number of
5 things. But say, for one, the demonstrative exhibit over here
6 that has at the top of each chain, sole private investor, on
7 two different sides there -- and Mr. Hart -- correct? Sorry.

8 **MR. HART:** Yes, Counsel.

9 **MR. FLOYD:** Thank you.

10 -- has said that, you know, "that's not Ms. Pomelova
11 who sits at the top there."

12 I realize that. I see, in Mr. Saevski's declaration
13 that he very conveniently refers to a sole investor being a
14 person. And persons, in my mind, constitute -- cover both
15 individuals and artificial entities.

16 And quite certain that -- you know, one thing that
17 we'd like to look for in discovery is at the top of that chain
18 there, the two sole private investors, who are they? And who
19 is the UBO -- the ultimate beneficial owner? That's the real
20 question.

21 When -- we're not talking here about any publicly
22 traded companies where people like me might have a share or
23 two. We're talking about privately-held companies, where
24 there's going to be one, maybe two, family members sitting at
25 the top, who own everything.

1 And that's who the ultimate beneficial owner is going
2 to be. And what we'd like to see is that chart over there
3 coming together with a little teepee at the top to show --

4 **THE COURT:** Okay.

5 **MR. FLOYD:** -- the name.

6 **THE COURT:** Okay, thank you.

7 I want all of the parties to keep note about, if I do
8 order discovery at the end of this, what exactly discover --
9 what discovery is going to be allowed? Okay?

10 Now, you may continue, Mr. Hart.

11 **MR. HART:** Your Honor, I'd like to point out that
12 what Counsel just asserted is nothing but pure speculation.

13 **THE COURT:** Okay, but don't use those words, please.
14 Just tell me what your proof is.

15 **MR. HART:** For the guidelines that the Fifth Circuit
16 says --

17 **THE COURT:** Everybody agrees.

18 **MR. HART:** -- to consider --

19 **THE COURT:** -- those are the guidelines.

20 **MR. HART:** "Is there a common stock ownership between
21 the two owners of these two vessels?"

22 There is no evidence of that, your Honor. There's no
23 evidence or argument that the stock of SPV SAM Eagle -- the
24 stock owner of SPV SAM Eagle, Inc. is in common with any stock
25 holder of Discover Investment Corp.

1 In fact, just the opposite is true, based on that
2 declaration.

3 So this first regarding factor, the answer is, "No,
4 there is no evidence of that factor."

5 "Do the parent and subsidiary have common directors
6 or officers?"

7 "The answer again is, "No."

8 The allegations and the evidence that FIMBank has put
9 forward do not establish that. They have pointed out that they
10 have identified that some of the SAM entities have directors
11 who are Panamanian persons in Panama.

12 But there's absolutely no evidence of any overlap of
13 those directors with Discover Investment Corp.

14 So that is not any evidence that would support a
15 reasonable inference that there are common officers and
16 directors between Discover Investment Corp. and SPV SAM Eagle,
17 or even this SAM Geneva or SAM Panama entity.

18 It's simply not. They -- all it does is show the
19 identities of directors of a few Panamanian entities.

20 So there's no evidence here to raise a reasonable
21 inference on Factor Number Three.

22 Number Four asks, "Do the companies, the parent, and
23 the subsidiary file consolidated financial statements?"

24 If that answer is, "No."

25 FIMBank has no evidence and no -- not even an

1 allegation that there are -- of that factor.

2 "Does the parent finance the subsidiary?"

3 There's no direct evidence of that at all. In fact,
4 the evidence that FIMBank has produced in their response proves
5 just the opposite.

6 There, among their documents, are ship mortgages,
7 which Counsel has referred to here. And there are several ship
8 mortgages for some of these SAM vessels.

9 But what that is evidence of is a bank. It's an
10 arm's length trans -- loan transaction with a bank. Their ship
11 mortgage is given by the Credit Suisse Bank.

12 So that just proves just the opposite. It's not any
13 parents financing a subsidiary; it's a bank financing the
14 purchase of these vessels.

15 So the answer -- on that factor, there truly is no
16 evidence that could raise a reasonable inference of the
17 existence of that factor of piercing the corporate veil.

18 "Did the parent cause the incorporation of the
19 subsidiary?"

20 There's no allegation in the complaint about that or
21 the response or evidence.

22 So the answer is, "No," on that factor.

23 "Is the subsidiary operating with grossly inadequate
24 capital?"

25 Here, FIMBank has no evidence. And I discern no

1 argument or allegation about grossly inadequate capitalization
2 of either of these entities.

3 The next factor down here says, "Does the parent pay
4 salaries and expenses of the subsidiary?"

5 There's no evidence or even an allegation of that
6 factor either.

7 Factor Number Nine asks, "Does the subsidiary receive
8 no business except that given by the parent?"

9 Here, I'd say again, there's no direct evidence of
10 that, but there's lots of innuendo and insinuation in FIMBank's
11 argument that, because the two ships -- the SAM Eagle and the
12 NIKA -- both have the same commercial ship manager, that,
13 therefore, they receive all their business from that commercial
14 manager.

15 But there's significant problem with that, from
16 FIMBank's perspective. And this -- I'd like to explain why
17 that is not evidence that raises a reasonable inference of any
18 of these alter ego factors.

19 And that's because the -- there's no crime and
20 there's nothing nefarious about having a contract with a
21 commercial ship manager.

22 Instead, it's very common. In fact, it's so common
23 that there are form contracts for these commercial ship
24 management contracts.

25 We have introduced in our -- or we've attached, in

1 our reply brief, copies of the ship management contracts.

2 They're there, attached to Mr. Saevski's declaration.

3 And so there is evidence now of the ship management
4 contract between SPV SAM Eagle and this entity called SAM
5 Panama -- of course, the entity called SAM Panama to manage the
6 SAM Eagle.

7 And there's another copy of a separate contract
8 between Discover Investment Corp. and SAM Panama -- it's the
9 same company -- to manage the M/V NICA.

10 What that is, is evidence of an arm's length
11 transaction to enter into a commercial management agreement.

12 They are entered into by two separate corporate
13 entities. What that does is demonstrate corporate
14 separateness.

15 It demonstrates that these corporations are observing
16 corporate formalities. It demonstrates that SAM Panama is
17 certainly not dominating and controlling either of the other
18 entities; in fact, just the opposite is true.

19 The entities that owned the vessels contracted for
20 SAM Panama -- for SAM Panama to provide the services. And so
21 those owner-entities pay a fee to SAM Panama to commercially
22 manage the vessels.

23 What the commercial manager is required to do, by its
24 contract, is written right into the shipman form contracts that
25 are in evidence.

1 They're actually in their file as Document Number
2 27 -- 27-3. They're all in 27-3; they're Exhibits B, C, and D,
3 to Dennis Saevski's declaration.

4 I'd like to point out to the Court that there
5 absolutely is nothing nefarious about a ship -- commercial ship
6 manager managing several ships owned by several different
7 companies.

8 It is so common, that there's a form contract
9 available for this kind of contract. It's called a "shipman."
10 It's a BIMCO form contract.

11 And the Court will see, in these exhibits, that it's
12 so standardized, there are boxes. And this is basically --
13 this a fill-in-the-box contract. And it's done here by these
14 entities.

15 So circling back to the alter ego factors, the ships
16 receive business that the commercial manager goes up to get for
17 them.

18 But the reason a commercial manager does that is
19 because that's it's contractually obligated job. They're
20 getting paid a fee to go out and find charters and even
21 authority to execute the charter parties to find commercial
22 business for these ships.

23 So that is absolutely not evidence of a parent --
24 either of these parent entities -- wherever they are in the
25 corporate chain, it is not evidence of a parent providing all

1 the business -- the ones the subsidiaries gets. In fact, it
2 disproves that element of alter ego.

3 Because what it does is prove that these corporate
4 entities have contracted with somebody else, in an arm's length
5 written agreement transaction, to go out and get that business.

6 So that's why I believe that it's correct, your
7 Honor, to write, "No," for Factor Number Nine, because the
8 evidence actually disproves that element.

9 I got to move on relatively quickly here.

10 "Does the parent use the subsidiary's property as its
11 own?"

12 And, here, there is no evidence or -- I think not
13 even an allegation of that from FIMBank, your Honor.

14 "Does the parent use the subsidiary's property as its
15 own?"

16 Here, there's absolutely no evidence that Discover
17 Investment Corp. used the other entity's property, the vessel
18 that's attached here in Corpus, the M/V SAM Eagle, as if it
19 were its own.

20 Likewise, there's absolutely no evidence that SPV SAM
21 Eagle, Inc. used the NIKA as if it were its own. And there's
22 no evidence that either of these sole private investors used
23 the other one's property as if it were its own.

24 So that -- the answer to question number ten is, "No,
25 there's not any evidence of that."

1 Instead, just the opposite is true, given this
2 allegation from FIMBank about the sale. They like to complain
3 about the sale of the NICA -- that Discover Investment Corp.
4 sold the NIKA after this standstill agreement expired.

5 Well, that's just evidence that Discover used its
6 property, the vessel, as if it were its own. So Discover was
7 entitled to sell the vessel if it wanted to. And it used its
8 vessel as if it were its own.

9 There's nothing about that -- that factor or any of
10 these others that crosses this vertical black line that is a
11 connection between SPV SAM Eagle and Discover.

12 We go on to Factor Number 11, "Are the daily
13 operations of the two corporations kept separate?"

14 Here, there's no evidence about the daily operations
15 of the actual owner-entities; SPV SAM Eagle or Discover
16 Investment Corp.

17 FIMBank falls back to that allegation about the fact
18 that both vessels have the same commercial manager, which now
19 is the company called SAM Panama.

20 But, again, it's similar to what I said a few minutes
21 ago. There's absolutely nothing nefarious about that, having a
22 contracted commercial manager for the vessel. It's common.

23 Nothing about it supports a reasonable inference that
24 the corporate entities ought to be treated as the same just
25 because they have both contracted with the same commercial

1 manager.

2 And if so, I'm writing "no" on that factor, because
3 the fact that they have a common commercial manager does not
4 meet that factor. But there's no evidence of -- there's any
5 operations departments within the owner-entities that are --
6 that are the same or not kept separate.

7 "Does the subsidiary observe corporate formalities?"

8 Here, the evidence, that even FIMBank submitted,
9 actually supports the fact that, yes, corporate formalities are
10 carefully observed by these companies.

11 They've submitted several copies of the ship
12 mortgages, which, as I've mentioned, are simply evidence of
13 different corporate entities entering into loan transactions
14 with Credit Suisse Bank.

15 They've got additional documents, such as some
16 pledges of stock shares. In fact, one of their documents is
17 within this dotted line here, they've alleged that there's --
18 that the 100 percent owner of SPV SAM Eagle, Inc. is a company
19 called global -- global-something.

20 And then its shares were pledged to a bank -- a
21 different bank -- D-V -- DVB Bank.

22 And my point about that exhibit is simply that it's
23 evidence that those two corporate entities were carefully
24 observing corporate formalities.

25 And they entered into a written document to document

1 this pledge of shares of the corporation to a bank. Not --
2 it's important to know that the shares were pledged to a bank,
3 not to anybody else in the corporate structure, and absolutely
4 not to anybody across this vertical line between the two
5 ownership structures of these two vessels.

6 And that's why I believe it is true -- well, it's
7 very true that there's no evidence, of this Factor Number 11,
8 that would support a reasonable inference that the corporations
9 do not observe corporate formalities.

10 Number 13 asks whether the directors of the
11 subsidiary acted in a primary and independent interest of the
12 parent.

13 And, here, they're -- that factor is no. There is no
14 evidence of that and there's no -- not even an allegation of
15 it.

16 FIMBank has written that they've identified these
17 three directors of some of the Panamanian corporate entities in
18 Panama. But there's absolutely no assertion that these
19 directors did anything wrong.

20 And absolutely there's no evidence of what directors
21 of Discover Investment Corp. did. And did they do anything in
22 the primary of its parent entity?

23 It's just not there, your Honor. So they can't
24 support an inference.

25 Number 14 asks whether others paid for guaranteed

1 debts of the dominating corporation.

2 Here, the evidence proves just the opposite, that
3 those same ship mortgage documents indicate that the corporate
4 entities themselves that incurred the debt from the bank had to
5 pay the debt back themselves.

6 There's not any evidence that those note is being
7 guaranteed.

8 But, again, I would point out, even if there were a
9 guarantee of loan is not a crime, it's not nefarious. And
10 that it's -- in fact, it's common. And there's no evidence of
11 it here.

12 Whether -- Factor Number 15 is whether the alleged
13 dominator deals with the dominating corporation at arm's
14 length.

15 And here I would say the ship management agreements
16 show that arm's length transactions for the owners to deal with
17 SAM Panama -- those are written agreements that refute this
18 allege -- this factor, as something that would support piercing
19 a corporate veil.

20 I would like to point out something about the
21 dominator or dominee corporation at this point, your Honor.

22 And that's this -- which I think is a significant
23 problem for FIMBank.

24 In their complaint that they used to support the
25 attachment of this case, they very clearly alleged that the

1 company called SAM Geneva is the mastermind and the dominator
2 of both Discover and SPV SAM Eagle.

3 Everything is controlled by the entity called SAM
4 Geneva. And that's what they used when they came in,
5 presumably for an *ex parte* hearing, to ask this Court to attach
6 this vessel. That was their alter ego theory, is SAM Geneva is
7 the dominator of all the corporations.

8 Now, they had changed course after they got the
9 vessel attached.

10 In their response pleading, they have actually
11 acknowledged to the Court that they already knew that this
12 entity, SAM Geneva, did not even exist in the year 2018, at the
13 time of this grain carriage by the NICA.

14 Now, shifting gears, they now say that, "Oh, it's not
15 the same Geneva entity. It must have been -- it must be the
16 SAM Panama entity or some SAM-other entity that is the
17 mastermind that dominates and controls these corporations."

18 That, I would submit, is pure speculation, your
19 Honor. There's no evidence that SAM Panama dominates anybody.

20 What the evidence now shows is that they knew the
21 allegation they asserted their theory on to begin with, could
22 not be true because SAM Geneva did not even exist.

23 And we know that SAM Panama does not dominate and
24 control because it's just -- provides contractual services
25 under that shipman form contract.

1 So that's why I believe it is correct to write, "No,"
2 for Factor Number 15, your Honor; for those reasons.

3 Number 16 asks, does decision making for the
4 subsidiary -- "Is decision making for the subsidiary made by
5 the parent or its principals?"

6 Here, there's no evidence of that, your Honor, or
7 even a supported allegation. Any decisions -- they've got
8 nothing about decision making for the SAM Eagle -- for that
9 vessel -- the SAM Eagle here.

10 There's nothing about a parent -- or, significantly,
11 there's no allegation or evidence that any of the SPV SAM Eagle
12 or any SAM entity made decision to control the vessel the NIKA.

13 Instead, the charter party for the NICA clearly shows
14 that the owner of the vessel is Discover Investment Corp.

15 And then later, as they've pointed out, Discover
16 Investment Corp. sold its vessel. And so -- and within all
17 that, there's no evidence of a decision making being made by
18 the parent.

19 You got no evidence to meet this factor either, your
20 Honor, that the parent and subsidiary used the same corporate
21 office.

22 Here, I would say FIMBank devotes a lot of pages and
23 a lot of argument to addresses or trying to figure out what are
24 the addresses of these various corporations.

25 And I would submit that that's made purposely vague

1 by FIMBank. And that goes back to what my colleague Mr. Wray
2 said about using -- relying on these Google databases to find
3 the addresses of corporate offices.

4 Not reliable information. But they had used it to
5 intentionally make it look confusing and make it look like
6 somebody did something sneaky because these Google databases
7 don't show a correct address for the various entities.

8 Here, as Mr. Saevski has pointed out in his
9 declaration and it is borne out in some of their documents;
10 like the charter party for the NIKA.

11 It's very clear. What is the corporate name and
12 where are its addresses?

13 And, in fact, FIMBank found a registered office
14 addresses for both Discover and SPV SAM Eagle and SAM Panama.
15 They've written it right into their complaint as, "Here's the
16 registered office of these entities."

17 And the charter party for the NIKA -- that is one of
18 their exhibits -- it identifies who is the owner of the NIKA.
19 It expressly says, "Discover Investment Corp." And then it
20 gives its registered office address in Monrovia, Liberia.

21 And then it says, "Who is the commercial manager for
22 this vessel?"

23 It very specifically names SAM Panama, and it give
24 the address, in Panama City, for Panama, for SAM Panama.

25 It says, "Who is the technical manager of the

1 vessel?"

2 It identifies Venturi. And it gives Venturi's
3 address, in Piraeus, Greece.

4 My point there, your Honor, is that there should not
5 be -- there is no confusion in anybody's mind about where the
6 office addresses are.

7 Instead, they've gone to great lengths to show that
8 these databases and, in some places, the -- when addresses have
9 changed, they've not been updated.

10 And, ultimately, what they're getting at is that the
11 vessel owner entities frequently use a care-of address to have
12 the commercial mail concerning their vessel mail care of the
13 commercial manager, SAM Panama. And that is the same address.

14 So I would say, on Factor Number 17, yes, there is
15 evidence that the owners used care of addresses, in care of the
16 commercial manager.

17 I would also submit that, as an alter ego factor,
18 having the same address or using the same corporate office is
19 an insignificant factor that does not carry much weight.

20 If it did, companies like ExxonMobil would be in
21 trouble. Or others, say, to think about how many ExxonMobil
22 entities all use the same address in the Woodlands, would
23 probably include a lot of -- as a matter of fact, as our
24 replient has pointed out, FIMBank itself has multiple FIMBank
25 entities that all have the same address for the same office in

1 Malta.

2 So it's an insignificant factor, your Honor.

3 Number 18, "Were there common business deposits?"

4 There's absolutely no evidence and no argument about
5 having common bank accounts or common deposits for these
6 companies, your Honor.

7 Number 19 asks, "Did the parent company exist solely
8 as a holding company for its subsidiaries?"

9 Really, the allegation from FIMBank is that SAM
10 Geneva -- or now they say, "SAM Panama -- is the dominant
11 mastermind; it must be a holding company for all these
12 entities."

13 But that's not true. Discover Investment Company is
14 not a holding company for the SAM Eagle or anything else. All
15 it does is own its one asset. And the same is true for SPV SAM
16 Eagle.

17 So that really has to be a "no" as well for Factor
18 Number 19, your Honor.

19 I would point -- like to point out two things, in
20 trying to summarize and conclude my remarks on this, your
21 Honor.

22 Two significant points are that the chronology and
23 the time when these factors would have to be by FIMBank is
24 significant.

25 The underlying dispute is this grain delivery in

1 Egypt, by the vessel the NIKA, in the year 2018.

2 So that's the time when it's FIMBank's burden to
3 show, if they can, that they would have -- be able to pierce
4 the corporate veil, under this alter ego theory, as of the year
5 2018, that these factors were met at that time.

6 The evidence that they submitted is all over the
7 place, chronologically. It goes back to 2014; I think some in
8 2015; some in 2016.

9 And I would ask the Court, when considering that
10 evidence and whether it -- whether it raises a reasonable
11 inference of alter ego status, in 2018 -- I would ask the Court
12 to take that into account -- that these historical documents
13 are meaningless for establishing alter ego in the year 2018.

14 Here's a significant reason why it's meaningless,
15 your Honor. And that's that the NIKA was acquired by Discover
16 Investment Corp., in the year 2016.

17 So some of FIMBank's argument talks about this
18 vessel, when it had a former name, called the SAM Tiger, and
19 its owner was a company called SPV SAM Tiger, Inc.

20 And that has absolutely no relevance or meaning for
21 trying to pierce corporate veils between Discover Investment
22 Corp. and the other SAM entities.

23 Discover has been the owner of that vessel since the
24 year 2016.

25 I would also -- my other point, your Honor, would be

1 that I would ask that if -- FIMBank, presumably, is going to
2 talk about these factors as well, I would ask --

3 I would challenge Counsel and I would ask the Court
4 to ask Counsel to explain -- and not just talk in circles about
5 these factors -- but to identify specific bits of evidence that
6 FIMBank truly says meets any of these factors and allows one to
7 draw a reasonable inference that this factor can be met by
8 FIMBank, right now, today, to establish a reasonable inference
9 that the corporate veil should be pierced.

10 And, in particular, to ask whether any of the
11 evidence -- that Counsel will talk about and that they've
12 already asserted -- crosses this black, vertical line.

13 They've got lots of argument about the SAM side of
14 this line -- and the SAM Panama and the SAM Geneva. There's
15 lots of argument about it.

16 But none of it, your Honor, crosses this line to
17 reach into Discover Investment Corp. or the M/V NIKA. There's
18 not a connection between them.

19 And that's why I submit, your Honor, that FIMBank
20 cannot meet its burden of showing why this attachment should be
21 held in place today to deprive SPV SAM Eagle of the use of its
22 property, the Sam Eagle.

23 **THE COURT:** Thank you.

24 **MR. WRAY:** Okay, your Honor --

25 **THE COURT:** Mister --

1 **MR. WRAY:** We address the final part of the evidence
2 (indisc.).

3 **THE COURT:** Wait just a minute.
4 What are you going to address?

5 **MR. WRAY:** The second part of the (indisc.).

6 **THE COURT:** Which is -- you have five minutes.

7 **MR. WRAY:** Sure. I'll be very brief.

8 Not only does FIMBank have to address (indisc.) alter
9 ego, they have to show it was used for fraud.

10 The only fraud they point to is a document that was
11 collateral for loan arbitration, saying, "Discover, don't sell
12 your vessels until June -- before June 21, 2019."

13 Discover sold their vessel on June 24th.

14 **THE COURT:** I understand that.

15 **MR. WRAY:** They adhered to the terms of the
16 agreement. There's no evidence of fraud.

17 **THE COURT:** I understand that. I understand that.

18 **MR. WRAY:** (Indisc.) establish (indisc.) alter ego
19 factors. Without the fraud, they have nothing.

20 **THE COURT:** All right.

21 Mr. Floyd, are you going to --

22 **MR. FLOYD:** Absolutely, your Honor. And I will try
23 to be as brief as possible here. Just got my notes down there.

24 And I thought, a good spot to start -- because Mr.
25 Hart spoke an awful lot about the ship management agreement.

1 And it is a standard form, prepared by BIMCO, which
2 is a maritime organization, while regarding everything. And
3 they publish an awful lot of standard forms, for everything
4 from charter parties, voyage charters, time charters, salvage
5 agreements -- all sorts of standard forms.

6 Standard forms are pretty common in the maritime
7 industry. And then bulk them on up with the rider clauses.

8 But Docket Number 27 tack 3 -- and I'm looking at
9 page 8 of 81, in that entry. Big entry is Mr. Saevski's
10 declaration. And I'm looking at the shipman agreement between
11 Discover and SAM Shipping Management S.A.

12 There's a really interesting thing that I think goes
13 to an awful lot of the 19 or so non-exclusive factors that Mr.
14 Hart just pointed to.

15 If you go to Box 22, of the shipman agreement -- Box
16 22 and 23 -- those are the notice clause provisions, saying,
17 "To whom does notice go by one party to the agreement when it
18 has something to tell to the other party to the agreement?"

19 So here, meaning, if Discover needs to say some to
20 SAM Shipping Management or SAM Shipping Management needs to say
21 something to Discover, where does that communication go?

22 Box 22: Really interesting. Notices to Discover
23 Investment Corp., they go care of SAM Shipping Management S.A.
24 and care of Venturi Fleet Management S.A.

25 They don't go to Discover Investment Corp. That's

1 because Discover Investment Corp., by all indications presently
2 known, is a Liberian entity with -- I don't even need to look
3 at this -- it's registered address at 80 Broad Street,
4 Monrovia, Liberia, just like tens of thousands of other single-
5 asset vessel owning companies.

6 80 Broad Street, Monrovia, Liberia. I'm sure every
7 shipping attorney in the room here has written that address
8 several hundred times in their careers.

9 So communications go to the manager, even if they're
10 coming from the manager, makes one logically wonder, "What is
11 the real purpose, if any, of Discover, other than serving as a
12 shell to be the registered owner of a vessel that can then be
13 easily transferred when there's claims against the vessel?"

14 That was point of theirs. Another cleanup topic --
15 and, certainly, I'll walk on through, briefly, the 19 points or
16 so. And I've summarized my views on those.

17 But a common (indisc.) was made, saying that FIMBank
18 or its attorneys filed this complaint and somehow knew that SAM
19 Shipping Asset Management, in Geneva -- which I now refer to
20 as, "Old Sam; Old Sam Geneva" -- that it had been -- had its
21 name changed to company, *General du Maritime le Commerce* S.A.

22 And then company a Maritime -- or whatever it's
23 called in French -- went into liquidation.

24 But, magically, a new company, also called Shipping
25 Asset Management, paren, SAM, close paren, S.A., was created

1 shortly before that, in Panama.

2 And so it just sprung right back into existence. I
3 personally feel zero guilt for not having seen that. It's
4 rather confusing to catch it.

5 And I think it was a late night, around midnight --
6 well after the complaint had been filed and well after my
7 adversaries had filed their motion to vacate the attachment --
8 flipping around and saw, wow, there's another company with
9 precisely the same name, located in Panama. What's the story
10 here? What's going on? Why would anybody do that?

11 And then you dig a bit deeper, and you look at
12 mortgages -- and these are all in the declaration of Mr.
13 Zadkovich, which we put it in opposition -- you look at
14 mortgages and there is a mortgage, from 2016 -- the mortgage-
15 related document. I forget whether it's an amendment or the
16 first mortgage or something else.

17 But there's a document, from late-2016. So about a
18 year after the name -- name change, and after the liquidation
19 in Switzerland, where Mr. Saevski signs off on that mortgage
20 document.

21 And what's contained in the address information being
22 given to the bank, which was Credit Suisse, for notice to go to
23 the mortgagor, says SAM -- or Shipping Asset Management, SAM,
24 S.A., on route to somebody in Geneva, Switzerland. It's the
25 old company no longer existing.

1 So, look, I fell for it; the bank fell for that; Mr.
2 Saevski doesn't say anything in his declaration here about
3 that -- certainly that he would sign off on that makes me
4 wonder about his declaration and a point of discovery that I
5 would certainly hope to take and I'll go anywhere to get that
6 done -- would be to take a deposition of Mr. Saevski.

7 But that's a very interesting factor right there.
8 I've never heard of a company that changes its name,
9 liquidates, but has a doppelganger in another country, ready to
10 step into their shoes and be used as notice address for the
11 bank, in a mortgage, surprising.

12 I would -- continuing to move on -- gentlemen, would
13 you mind if I moved to this mic?

14 **MR. SPEAKER:** Fine with me. It's all right.

15 **MR. FLOYD:** Andy, could you give me a hand?

16 **MR. NASH:** Yeah.

17 **MR. FLOYD:** That would be great. Thank you.

18 Moving on through these quickly, I know -- and not
19 surprisingly -- the attorneys -- Counsel for SAM Eagle -- SPV
20 SAM Eagle have said no on each of these.

21 I think that we would say yes on nearly every single
22 one. And on a few, it might be, you know, to be determined
23 during discovery; just be realistic there.

24 But, "Is there common stock ownership?"

25 Well, these are all, as we can tell, closely held

1 companies. They're not publicly traded. They're not owned by
2 even five or six different companies being involved.

3 There's going to be single owners all the way up the
4 chain, until you get that ultimate beneficial owner, at the
5 very top.

6 But the fact that, as shown in Exhibit L, to Mr.
7 Zadkovich's declaration -- the fact that Steamship Mutual
8 issued renewal numbers for two years in a row, for the vessels
9 in the SAM Shipping fleet, and those renewal numbers were
10 sequential when it went to SAM-animal-this, SAM-animal-that,
11 SAM-animal-bird, NIKA, and then some other ships -- in fact, to
12 the SAM-animals, they were sequential.

13 And we (indisc.), supporting the maritime industry,
14 we have a good understanding of how P&I Clubs work, sequential
15 numbers would not get issued unless those vessel-owning
16 entities under the same beneficial ownership.

17 Likewise, even after the former SAM TIGER became
18 known as the NIKA -- now it's known as the NORD -- still
19 prominently emblazing painted on its hull, and sailing around
20 the world for a good number of years -- was SAM Shipping, in
21 big, big letters.

22 I'm quite certain that discovery would show that
23 there is common stock ownership at the UBO -- ultimate
24 beneficial ownership level -- amongst all these entities, and
25 certainly including in SPV SAM Eagle and Discover.

1 With that said, the reality is ships -- part of the
2 assets. Nobody has come forward and identified a single
3 employee or a single operating address of any of these vessel
4 owning companies.

5 There is registered addresses. There's 80 Broad
6 Street, over in Monrovia; and there's an address at High Tech
7 Tower, in Panama City.

8 But those are -- 80 Broad Street is where the
9 Liberian corporate registry is located. That's its
10 headquarters. And the High Tech Tower address is a law firm,
11 Ballard and Ballard, in Panama City.

12 I don't think anybody's actually chartering ships --
13 I can say, with certainty, regarding 80 Broad Street. And I
14 don't think that's happening in High Tech either.

15 I won't go through and change any of these, where it
16 says no or yes or anything like that.

17 The common stock ownership, likewise, somewhere down
18 there, there was the issue of addresses.

19 Common directors and officers: These types of
20 companies -- which are closely held companies set up in
21 offshore jurisdictions to own single assets -- have nominee
22 directors and nominee officers.

23 The real question there is, "Who are the employees?
24 Who is running things day to day?"

25 And there is commonality there. That commonality is

1 the shipping management company. It does it for all of them.
2 And that's not even in dispute.

3 Whether it's old SAM Geneva, new SAM Geneva, or SAM
4 Panama, it's the same management company. And now, on the
5 technical management side, there's deals with (indisc.) and
6 other issues like that.

7 You have Venturi, in Greece and Piraeus, which does
8 it for all of them. That's the director, that's the employee.
9 It's the SAM Shipping Management company -- whatever, besides
10 names being used at a given time.

11 Same thing goes for common business departments.
12 They don't have an accounting department.

13 I'll be amazed -- surprise me during discovery -- if
14 Discover Investment Corp. or SPV SAM Eagle have an accounting
15 department and an accounts receivable department, a voyage
16 chartering department, a time charter -- they're not going to
17 have it.

18 It's because everything -- all of those functions are
19 performed by the management company, be it the commercial
20 management company or the technical management company -- both
21 of which are now being run from the same address in Piraeus,
22 Greece.

23 Consolidated financial statements: I don't know the
24 answer to that.

25 I also would be really surprised if anyone could

1 track down a financial statement, other than what's internal to
2 group, and probably maintained by shipping manage -- the
3 shipping management company.

4 Does the parent finance itself: What we put in, in
5 supporting documentation, as well as, as I recall, reference in
6 the complaint, is that there had been a good deal of cross-
7 financing -- of fleet financing within this group over the
8 years.

9 What I mean by, "cross-financing," is that, an
10 ultimate beneficial owner whose single-asset companies have one
11 ship each -- Ship X, Ship Y, and Ship Z -- it goes to the bank
12 and says, "Bank, I will pledge, I will mortgage, I will do
13 this, with respect to each, X, Y, and Z, in order to get the
14 funds from you to update those ships and go purchase a new
15 vessel..." -- should have started earlier in the alphabet --
16 "...I'm going to go purchase Ship A as well."

17 That's cross-financing. There's evidence of that
18 here. That's the same (indisc.) financing the subsidiary.
19 Because the parent is using its assets, regardless of precise
20 entity denomination for ownership in order to fund overall
21 operation and growth.

22 "Did the parent cause the incorporation of the
23 subsidiary?"

24 I've read that a million times, and I never really
25 understand what it means. Because, in my mind, the parent

1 company always cause incorporation of the subsidiary. So I'll
2 take a pass on that one. I just don't understand it.

3 "Is the subsidiary operated with grossly inadequate
4 capital?"

5 Obviously, with an awful lot of these factors, as the
6 Plaintiff here bring the claims against a group of closely-held
7 corporations and the rather murky-sometimes world of maritime
8 commerce, we're on the outside, looking in.

9 And there is always going to be a degree of informed
10 speculation. And it is informed, of course, by experience in
11 the maritime industry.

12 But what do we know right now regarding Discover
13 Investment Corp.?

14 Well, a few days after the cessation of the
15 standstill agreement -- which Discover entered into with
16 FIMBank, in order to forestall any attempts to arrest or
17 attach, not just the NIKA, but other ships in the same or
18 associated ownership, management, or control, very important,
19 meaning the fleet.

20 Just after that protective agreement to protect the
21 whole fleet expired, Discover sold the NIKA to a company which
22 had been established -- I think it was April 24 of the same
23 year, a few weeks before -- a few weeks after the standstill
24 agreement -- and nobody's ever heard it before -- called,
25 Anchor Nautical Inc., another Liberian entity.

1 I haven't been able to find out anything about
2 Anchor. Who owns it? Where does it have offices? Anything
3 like that. Very, very mysterious company, created after the
4 standstill agreement was entered into.

5 And then it purchased the sole asset of Discover a
6 few days after the standstill agreement expired.

7 Well, you sell a ship. Ships are worth a good deal
8 of money most of the time. Generally, one expects some cash to
9 flow from that.

10 But so far, over in England, where there's a freezing
11 injunction proceeding going on, and related considerations,
12 Discover has not shown up to post any cash to have the
13 freezer -- the freezing injunction against it released.

14 It's surprising for a company that should be cash
15 rich prolong the sale of its sole asset.

16 So I think that one there is certainly supported with
17 a reasonable inference.

18 I'll try to move through this, your Honor.

19 "Does the parent pay salaries and expenses of the
20 subsidiary?"

21 Again, it goes back to the same point throughout all
22 of this.

23 We're dealing with the maritime industry, with
24 closely held companies that are operated by that same shared
25 commercial manager and same shared technical manager.

1 Those managers are the personnel; they're the
2 officers, directors, employees. They're everything. The only
3 other person you can find is the ultimate beneficial owner.

4 So, yes, the same people are getting paid by those
5 same other persons.

6 "Does the subsidiary receive no business except that
7 given by the parent?"

8 I think it's on page 10, of SAM Eagle's opposition
9 brief, where they basically acknowledge that.

10 I won't delay things looking on through my notes.
11 But what they said in their brief is that, that's the norm, or
12 course. That's what a management company is there for, and so
13 there's nothing surprising or nefarious about getting business
14 from a management company.

15 Well, that may be the case. But as of so many of
16 these things, when the management company does everything for
17 the business that's located at 80 Broad Street, Monrovia,
18 Liberia, one starts to wonder.

19 Your Honor, I don't want to drive anyone nuts here,
20 going on through. I'll be more than happy to go through each
21 of these, or if there's other proceedings, I can hit on some --
22 highlight any of the key ones the Court's interested in.

23 **THE COURT:** This is your hearing. You tell me what
24 you think is important.

25 **MR. FLOYD:** Thank you, your Honor. I'll keep going

1 then.

2 "Does the parent use the subsidiary's property as its
3 own?"

4 That harkens back to the point already regarding
5 cross-mortgaging, cross-financing of vessels. Take Vessel X to
6 go purchase Vessel A. That's using property in a unique way,
7 to put it mildly.

8 "Daily operations kept separate?"

9 No. The daily operations are fully consolidated.

10 They're all run day-to-day operations by the
11 management companies.

12 "Does the subsidiary observe corporate formalities?"

13 We already touched on the oddity regarding the
14 shipman agreement, where notices from the manager would go
15 circularly back to the manager.

16 I would propose that that certainly is not corporate
17 formality. On money to loan, with that, there's the oddity --
18 which I just find a bit funny -- with the mortgages document.
19 Again, it's cited in the brief and next to -- not in the brief,
20 but in the declaration -- and exhibited there too.

21 There's the oddity when a mortgage document was being
22 executed, in Singapore, with respect to the M/V SAM Eagle, and
23 there needed to be a page where somebody named Dennis Magee --
24 Damien Magee needed to sign it, and sign it before a notary in
25 Singapore.

1 And the funny thing about it was, the Singaporean
2 notary identified Mr. Magee as being the authorized
3 representative, not for SPV SAM Eagle, but for SPV SAM Tiger,
4 former owner of the NIKA, just shows -- go to show how close
5 everything is amongst this -- with companies and this fleet.

6 "Were the directors of the subsidiary act in a
7 primary and independent interest of the parent?"

8 I think that's certainly the case when you have a
9 vessel manager running an entire fleet of ships, and nobody
10 knows who the single asset vessel owning companies really are,
11 other than a bunch of names at registered addresses, I don't
12 think anyone's really doing things for them.

13 "Payment or guarantee of debts of the dominating
14 corporation."

15 In our declaration, in opposition to the (indisc.)
16 motion, a number of the mortgage-related documents concern the
17 pledge of assets or the pledge of sale -- pledge of shares comes
18 to mind -- by companies sitting up at the top of the group.

19 Two companies there are called, Dry Bulk Global
20 Limited and Dry Bulk Maritime Limited -- pledged their shares.
21 This was over in Hong Kong -- in a number of the SPV SAM
22 companies.

23 Likewise, there's the cross-financing of the ships.
24 So the Ship A is used to finance the purchase of Ship B. That
25 is throughout the group.

1 "Whether the alleged dominator deals with the
2 dominating corporation at arm's length."

3 I won't go back again to the shipman agreement. But
4 that certainly underscores that there.

5 Additionally, though, FIMBank's complaint has made
6 allegations that two vessel sales were sham sales. That would
7 be the sale by SPV SAM Tiger -- of the Tiger -- to Discover
8 Investment Corp., where it became the NIKA.

9 And then, on the back end, much more recently, the
10 sale of the NIKA, from Discover, to Anchor Nautical, when it
11 became the NORD, were both sham sales; not arm's length sales.

12 And, in support of that, there's the declaration of
13 Mr. Pagonis that's been submitted. He's a consultant in the
14 maritime industry. And he took a look at information
15 concerning trade patterns and where these ships sail, whether
16 or not there was marketing for the vessel.

17 You know, if you want to sell your house, you want to
18 sell a boat, something like that, you market it. You go out
19 into the market, you let brokers and other people know that
20 you're looking for a buyer so you get the highest possible
21 price. He saw no indication of that.

22 And, likewise, quite notably, with respect to both of
23 those sales -- the earlier one when it became the NIKA and the
24 late one when it became the NORD -- Steamship Mutual remained
25 in P&I Club -- all of which indicate that it stayed within the

1 same family.

2 Generally, when a ship changes ownership, truly
3 changes ownership, the new owners would move to their preferred
4 P&I Club. And, certainly, the sequencing of renewal numbers
5 will not stay, 1, 2, 3, 4. If they do stay with the same club,
6 maybe it'll be 1, 2, 3, 26.

7 Same corporate office. We haven't seen any corporate
8 office so far, other than the offices of the various SAM
9 Shipping Management companies or Shipping Asset Management SAM
10 companies, be they in Geneva or in Greece -- wherever they want
11 to bounce around to -- at the office. There are shared
12 offices.

13 That also is a, "Yes."

14 "Common business deposits."

15 Financial information is confidential at this stage.
16 And we would most certainly need discovery to identify the
17 banking relationships. That's one of the points that I
18 identified earlier on here.

19 And 19, Did the parent company exist solely as a
20 holding company for its subsidiaries:

21 That goes to who is the ultimate beneficial owner.
22 We're not really talking about a -- well, it goes at two
23 levels.

24 If one views the shipping management companies as
25 being the parent, then it is both -- it's running those assets

1 and controlling them for the ultimate beneficial owner.

2 I would expect that the ultimate beneficial owner is
3 not a holding company, but an individual. But even holding
4 companies have individuals sitting behind if you break through
5 the trust and find out who it is.

6 Your Honor, that's running on through those questions
7 there. And then I know, at the very end there, Mr. Wray had
8 brought up that there's the additional prong to an alter ego
9 analysis of not just showing enough sufficient commonalities
10 amongst the group, but also proper allegations of the corporate
11 form being abused to do some wrong.

12 And to be clear, cases again and again and again have
13 said that fraud -- actual fraud is not required. It's that the
14 language, in White Rosebay, I think was -- I think it was just
15 wrongdoing. But fraud or other wrongdoing is commonly said.

16 But we point to here would be the standstill
17 agreement. Quite clearly in -- I think it was April --
18 whenever it was -- late March of 2019, when Discover and
19 FIMBank entered into their so-called standstill agreement.

20 FIMBank agreed that it would not pursue arrest or
21 attachment of any ships in -- of the NIKA or of any ships in
22 the same or associated ownership management or control.

23 It complied with that bargain.

24 But, low and behold, during the course of that
25 standstill agreement, Anchor Nautical was established down in

1 Liberia.

2 And as soon as the agreement came to its end, the so-
3 called --

4 **THE COURT:** So how does that end up being fraud?

5 **MR. FLOYD:** Your Honor, it doesn't need to be fraud.
6 Other wrongdoing --

7 **THE COURT:** Why is it wrongdoing --

8 **MR. FLOYD:** -- is sufficient.

9 **THE COURT:** -- if they create a company that -- if
10 somebody creates a company and then, after the agreement has
11 completely expired, they sell their vessel to that entity?

12 **MR. FLOYD:** To an entity within the same family, I
13 think that that is wrongful because it's misleading to the
14 world. If --

15 **THE COURT:** Okay, I need to take a break. I've got
16 to sign a search warrant. And then, when we come back, I'm
17 going to give both sides ten minutes, period.

18 You make all your arguments then.

19 **THE MARSHAL:** All rise.

20 **(Court is in recess from 4:17 to 4:32 p.m.)**

21 **THE COURT:** All right. We're back on the record on
22 the FIMBank case, 19-cv-264.

23 Do you want to finish up?

24 **MR. FLOYD:** Yes, your Honor. I can finish off in one
25 minute. My -- the last comment that I was on there the Court

1 had asked about the transfer of the NIKA from Discover to
2 anchor, and on that point, in our brief from the *White*
3 *Rosebud* -- the *White Rosebay* case, we cited page six of that
4 argument, a quotation from that, that all that's required --
5 it's not fraud, but all that's required is an element of
6 injustice or fundamental unfairness, and that case also noted
7 that the shifting of assets could be an indicia of abuse of the
8 corporate form. That's what we're getting at here, your Honor.
9 The concern, the fundamental concern, is that Discover sold its
10 sole asset, proceeds would ordinarily flow from such a sale,
11 but the appearances do seem to be that Discover is not exactly
12 cash rich at the moment and perhaps without assets, and that
13 that transfer has been from a known entity within the same
14 group, apparently to what was an unknown entity within the
15 group. And I would also disagree; I know there were comments
16 beforehand that one can go and arrest a ship anywhere around
17 the world. It's not nearly that easy. Ships can run. Chasing
18 a ship around the world, they're peripatetic assets. You need
19 to find it; then you also have to comply with the local law
20 where you find it. And that law varies greatly. So, it's not
21 as easy as one might say. On top of all of that, even if there
22 were a possibility of seizing the NIKA or now the NORD
23 someplace else in the world, it has zero bearing legally on
24 this proceeding here now.

25 Your Honor, those were all the comments that I had in

1 rebuttal there. I can certainly sum up when the Court would
2 like.

3 **THE COURT:** Mr. Ray? No, Mr. --

4 **MR. HART:** Your Honor --

5 **THE COURT:** Mr. Hart, right?

6 **MR. HART:** Yes. Yes, your Honor. Mr. Hart speaking.
7 I would like to make three points that I intend to and believe
8 I can make them briefly; three points in response to counsel's
9 remarks.

10 First, in counsel's argument just now to the last
11 bit, particularly regarding the alter ego factors and the two
12 posters that counsel just went through, I would like to point
13 out that none of those arguments and none of that evidence
14 crossed this black vertical line on our chart to connect
15 Discover Investment Corporation. I was listening carefully for
16 it, and I heard none --

17 **THE COURT:** I don't think -- I think you would agree
18 that it didn't, but I think what he mentioned earlier was
19 that's what he needs the discovery for. You have -- is that
20 right?

21 **MR. FLOYD:** Yes, your Honor. It's -- there's
22 potential cross with respect to the management company, but
23 ultimately with -- what matters is what's not shown on that
24 chart, who sits above the two sole private investors. That's
25 where that TB (indisc.) --

1 **THE COURT:** That's what you're talking about in terms
2 of the beneficial owner.

3 **MR. FLOYD:** Yes, your Honor.

4 **THE COURT:** Okay. Go ahead.

5 **MR. HART:** In terms of the alter ego analysis, your
6 Honor, I'm simply pointing out that none of the evidence or
7 arguments establishes or allows one to draw a reasonable
8 inference today that there is a connection to Discover
9 Investment Corp., that the corporate form -- that any of
10 these -- this evidence was used to abuse the corporate form of
11 Discover Investment Corp. --

12 **THE COURT:** Okay. Now --

13 **MR. HART:** -- it's simply not there.

14 **THE COURT:** -- you said something a minute ago about
15 it's too late to order discovery because we're in this hearing
16 now. Tell me exactly what you were talking about.

17 **MR. HART:** I'm talking about the fact that in this --
18 to attach property under Rule (b) is not intended to be --
19 under the Admiralty Rules, the Federal Rules of Civil
20 Procedure, is not intended to be a procedural tool that opens
21 the door to discovery. It's instead -- Rule (b) itself, the
22 attachment of property, is an extraordinary remedy.

23 **THE COURT:** I understand that.

24 **MR. HART:** And, then, so it requires a heightened
25 standard. It's not open-ended discovery.

1 And the second point is that the alter ego, veil
2 piercing theory, is itself, as the case law says, an
3 exceptional remedy; exceptional thing to do.

4 **THE COURT:** Uh-huh.

5 **MR. HART:** And it's not the rule, it's not the norm;
6 it's an exception.

7 **THE COURT:** But are you telling me that I cannot
8 order discovery on this issue if it appears that discovery
9 would be warranted?

10 **MR. HART:** Not at all. Not at all. That's not what
11 I'm suggesting, your Honor.

12 **THE COURT:** Okay.

13 **MR. HART:** Certainly we understand the Court has the
14 authority and the discretion to order discovery. What I am
15 doing and what we are doing is asking that the Court not allow
16 that discovery for these reasons.

17 **THE COURT:** Okay.

18 **MR. HART:** But -- for all those reasons.

19 **THE COURT:** I understand.

20 **MR. HART:** But that if that discovery is allowed,
21 then we'll -- then we would very much ask the Court to require
22 FIMBank to deposit the money to cover these custodial expenses
23 to hold the vessel in custody while they conduct their
24 discovery, which essentially would be a fishing expedition for
25 them to try to find out what if they might find some

1 information about Discover.

2 I'd also like to point out that -- I don't want to
3 forget this point, your Honor, which I think is an important
4 one. So much, in fact, nearly all, of their alter ego theory
5 relies on the fact that there is a common commercial manager
6 for the two vessels.

7 **THE COURT:** I heard the argument about that. I don't
8 need it repeated. Was there something else you wanted to say?

9 **MR. HART:** I just wanted to point out how that's so
10 much like -- it's not unlike an office building management
11 contract, a company like CBRE that manages lots of office
12 buildings, and there's a building management agreement with
13 CBRE, and CBRE conducts all the business of that building, goes
14 out and gets tenants, collects rents, sign leases, and they
15 maintain the building, they pay all the expenses for the
16 building. They are required to go and deal with the insurance
17 for the building. They, basically -- CBRE runs all the
18 business of the building. CBRE also does that for lots of
19 other buildings. And each of the -- many of the buildings are
20 owned by different owners. So, the fact that lots of different
21 buildings and lots of different real property owners contract
22 with CBRE to manage their asset, that does not mean that all
23 those owners are alter egos of each other --

24 **THE COURT:** But how did they all get the name SAM?

25 **MR. HART:** -- or that the building --

1 **THE COURT:** How did they all get the name SAM?

2 **MR. HART:** Well, actually, your Honor, they don't.
3 Discover Investment Corp. does not have the name SAM, and MV
4 NIKA does not have the name SAM. They don't all have the name
5 SAM. But over here on the other side, SPV SAM Eagle, the SAM
6 actually, I think, originally came from Shipping Asset
7 Management.

8 **THE COURT:** But doesn't the NIKA have the name SAM,
9 or do I have that wrong? Now.

10 **MR. HART:** That is --

11 **THE COURT:** After being sold. SAM NORD or something?
12 Or did I get that wrong?

13 **MR. HART:** It is not --

14 **MR. FLOYD:** No, now it is NORD. Sorry.

15 **THE COURT:** Ah.

16 **MR. HART:** There is no SAM in its name now, your
17 Honor.

18 **THE COURT:** Okay. All right. Was there when it was
19 sold?

20 **MR. HART:** No, there was not.

21 **THE COURT:** Okay. All right. Then, I was wrong
22 about that. I'm sorry. Go ahead.

23 **MR. FLOYD:** It was the SAM -- it was the SAM Tiger
24 (phonetic) originally up until 2016.

25 **THE COURT:** Okay. Yeah. All right. That's where

1 the SAM came in. Okay.

2 **MR. HART:** But that was two years before this and
3 before it was sold to Discover Investment Corp.

4 **THE COURT:** Go ahead.

5 **MR. HART:** My last point, your Honor --

6 **THE COURT:** Yes, sir.

7 **MR. HART:** -- is that -- to point out that none of
8 this -- these documents and alter ego evidence that counsel was
9 talking about, none of that goes to the element of perpetrating
10 a fraud. None of it allows one to draw a reasonable inference
11 that the corporate form of Discover Investment Corp. was abused
12 in order to perpetrate a fraud or a wrongdoing or an injustice
13 to FIMBank in connection with the transaction at issue. And
14 that's what the case law would require for piercing the
15 corporate veil, and that's what they don't have any evidence
16 of, and the transaction at issue here is the delivery of grain
17 by the NIKA in Egypt, and none of this talk or documents
18 establishes a reasonable inference of any fraud or wrongdoing
19 in connection with the delivery of the grain by the NIKA.

20 **THE COURT:** Thank you.

21 **MR. HART:** Thank you, your Honor.

22 **THE COURT:** You've got a couple of minutes, Mr. Nash.

23 **MR. FLOYD:** I'll be extremely quick, your Honor.

24 Regarding the name SAM being associated with the NIKA, when it
25 was still the NIKA and well after for a long period of time

1 following that sale, that's probably coming from the photograph
2 that shows a vessel that has NIKA up on its bow and then in
3 great big letters says SAM Shipping along the hull there.
4 That's one of the exhibits; I think it's -- well, it's one of
5 the exhibits in our brief. I can certainly look it up if of
6 interest.

7 **THE COURT:** Okay.

8 **MR. FLOYD:** Regarding the analogy to CBRE and real
9 estate management companies, I think there is a huge difference
10 there, which is that, generally, so far, with technology, a
11 building stays in the same place. And, so, if you slip and
12 fall at a building or building breaches a contract, flooding in
13 an office space, whatever it may be, the building's there.
14 Shipping is a bit different because ships sail around the
15 world, change the names, change their ownership companies; a
16 very, very difficult-to-follow industry sometimes.

17 Additionally, as to the proposition that FIMBank
18 should have to deposit some sum of money, we are -- FIMBank is
19 already making routine payments to the U.S. Marshals Service,
20 which is maintaining the custody of the vessel pursuant to this
21 Court's order. We are making that -- in fact, it's \$10,000
22 every eight days that's being paid by FIMBank, and that's, you
23 know, a substantial sum of money there. I am unaware of any
24 proposition in the rules, in the supplemental rules, that says
25 some additional sum beyond what the marshal has asked for and

1 instructed, which is the 10,000, needs to be paid. It sounds
2 to me like SAM Eagle is looking for some sort of -- can't even
3 call it counter security, because counter security wouldn't be
4 available here, but some sort of leverage to make life
5 difficult for FIMBank, tougher than it already has been after
6 being out of pocket \$5 million or so.

7 **THE COURT:** What were you talking about, Mr. Hart, if
8 they're already paying for it?

9 **MR. HART:** There's -- actually, Mr. Buchanan, if you
10 don't mind, could address that. He's got the expenses that
11 have been incurred here in this port while the vessel's been
12 under custody. It's not only what the marshal is charging for
13 security on the ship; there's been lots of other --

14 **THE COURT:** Okay. Just a minute, Mr. Buchanan.
15 Did you finish?

16 **MR. FLOYD:** I had not, your Honor. I can finish up
17 very quickly, but why doesn't Mr. Buchanan go. I wasn't clear,
18 though, what Mr. Buchanan states on to the ports?? were for.

19 **MR. HART:** SPV SAM Eagle.

20 **MR. FLOYD:** Okay; because there was a reference there
21 to the port, too, that that confused me. It was for the
22 dockage. Well, sir, why don't you go ahead, please.

23 **MR. SPEAKER:** Okay. Thank you.

24 **MR. BUCHANAN:** Your Honor, in addition to what the
25 marshal is charging, there are custodia legis expenses that

1 have been --

2 **THE COURT:** So, the marshals are only talking about
3 their fees?

4 **MR. BUCHANAN:** Yes.

5 **THE COURT:** And, then, you're -- okay.

6 **MR. BUCHANAN:** The marshal charges their fees, but
7 the marshal isn't collecting for the custodia legis expenses
8 that have been incurred. For example --

9 **MR. SPEAKER:** I'm sorry, sir, but this is a separate
10 motion. I don't think this --

11 **(Talkovers)**

12 **MR. SPEAKER 1:** And your Honor, I'm --

13 **THE COURT:** No, no, no.

14 **MR. SPEAKER:** Our Motion --

15 **MR. HART:** Your Honor, since the court asked that
16 question of us, we'd request an opportunity to answer the
17 court's question about what we were talking about in these
18 custodial (indisc.) expenses and that's what Mr. Buchannan was
19 explaining --

20 **THE COURT:** Okay. And what you're telling me is
21 there is a bunch more, and not just the --

22 **MR. BUCHANNAN:** There's roughly \$200,000 has accrued
23 already in the last two months for dockets for the Port of
24 Corpus Christi, mooring expenses, pilot expenses, agency
25 expenses and tug boats when the vessel was shifted from one

1 dock to another and then shifted to offshore. And anticipated
2 probably another as much as \$70,000 in expense for fuel for the
3 ship and for transportation by a launch to return the ship's
4 certificates to it. So if the court is contemplating allowing
5 discovery, SPV SAM Eagle, Inc. would request the court
6 condition that discovery on FIMBank depositing another \$250,000
7 in the -- with the marshal to cover the expenses for
8 maintaining the vessel while it's under this court's custody.

9 **MR. FLOYD:** Your Honor, I'll just note that that is
10 the subject of a separate motion. It's already pending, I
11 don't think fully briefed at this point. Those issues that
12 we'll debrief in connection with that, including the fact that
13 there was another arrest. There was an arresting party for a
14 substantial chunk of time at the front end of this special --

15 **THE COURT:** Has that been resolved? The arresting
16 party at the front end?

17 **MR. HART:** I understand it was resolved, your Honor.
18 I don't know much about it but I believe --

19 **THE COURT:** Like a measly few thousand dollars
20 compared to this one, right?

21 **MR. BUCHANNAN:** It was almost immediately resolved,
22 your Honor, the amount in dispute --

23 **THE COURT:** I thought it would be.

24 **MR. BUCHANNAN:** The amount in dispute was paid and
25 the vessel was released within a day or two.

1 **MR. HART:** And as I understand it, it concerned a
2 maritime lien against this vessel, the Sam Eagle vessel.

3 **MR. BUCHANNAN:** That's correct.

4 **MR. HART:** It was not a --

5 **THE COURT:** Right, right, that's right because I was
6 the one that signed the papers on that. I do remember and
7 that's why I was so concerned when we started talking about the
8 whole alter ego thing. Okay. Go ahead, Mister --

9 **MR. FLOYD:** Your Honor, I just wanted to note that
10 that's separate pending motion out there.

11 Overarching comment from me, consideration is that
12 the burden -- and it's pretty clear. The burden on FIMBbank at
13 this state at the stage of an E4F fakitor (phonetic) motion is
14 to demonstrate that the information available, be it in the
15 complaint or in supporting documents, supports a reasonable
16 inference that it has its claim against the defendant. And I
17 think that that has been satisfied here. Even if there's any
18 doubt as to whether or not we've reached that reasonable
19 inference support level, I think we've certainly gotten to the
20 level that discovery, limited expedited discovery is warranted.
21 We'd look for ownership information; we'd look for information
22 about what, if any, personnel these various companies have
23 other than the management company. We'd look for banking
24 information to see the answer to that deposit thing, the
25 ultimate beneficial owner. Insurance. And where the proceeds

1 went from the sale of the NIKA as well as some basic
2 information regarding chartering in and chartering out
3 practices. But I think we've satisfied that burden, your
4 Honor, and certainly gotten over the hurdle of being that
5 discovery is warranted to get to the bottom of this.

6 Thank you, your Honor.

7 **THE COURT:** Okay. The problem is that as far as both
8 sides are concerned, there is no good news and there's no good
9 news. And then there's more no good news. Because if the fees
10 are as Mr. Buchanan says, then at some point, fairly soon, the
11 value of the vessel is going to be exceeded. And I'm not the
12 one who decided how these cases are supposed to be handled.
13 But Judge Ramos assigned this case to me and as I'm sure all of
14 you understand, there are going to be these inevitable delays
15 that are going to involve my preparing a recommendation to her,
16 even though I know it's a warrant of arrest. But to quash a
17 warrant to arrest, it's got to be done by M&R. And then Judge
18 Ramos has to make a decision about what to do and none of that
19 -- and it might be at the end. Let's just say I don't order
20 discovery. It might be at the end of that period that she
21 orders discovery or she has a hearing or she decides to do that
22 prior to making any kind of a ruling on any recommendation that
23 I'm making. I'm just pointing out the realities of how this
24 works and how it's set up and I can't make dispositive
25 decisions on this case so

1 And then to make matters worse for all of you, I'm
2 retiring at the end of the year and there will be somebody new
3 taking my place. And she will automatically be substituted in
4 for anything that's going on. So that's another person who's
5 going to have to get up to speed on the case.

6 My suggestion is -- I don't know if you can work this
7 out but it's going to -- just inevitably, it's going to take
8 some more time before this very basic decision is made. And
9 I'm not saying that -- I'm not trying to make a threat or
10 anything like that but sometimes I think that when the lawyers
11 come here, they don't really understand the realities of what's
12 going to happen when you have all these people. This is like
13 more than one person involved in making the decisions in this
14 case. So I just wanted to point that out.

15 I will do my best to get something out very soon. I
16 would -- I have to tell you, I don't know what I'm going to --
17 what kind of a decision I'm going to make. If you want time to
18 file post-hearing briefs, that's fine with me but you've got to
19 understand what all the realities are and how long it's going
20 to take for all this to eventually be decided. So I don't know
21 if any side feels like they need time to file additional
22 briefs. But it seems to me that when you have these foreign
23 entities involved, these foreign shipping companies, foreign
24 owners, a different way of -- different companies that have a
25 different way of handling assets and corporate minutes and

1 corporate partnerships and eventual owners and beneficial
2 owners and that kind of thing, but you can't tell someone who
3 makes a showing that maybe there is something to this, that
4 they can't go and do some limited discovery. If limited
5 discovery is ordered, what kind of time are you talking about
6 needing?

7 **MR. FLOYD:** Judge, I think we can move very quickly.
8 If we were authorized to proceed with discovery today -- and
9 I'd be happy to consult with counsel on this and come back with
10 an answer quickly -- I think we could have everything --
11 Christmas might be too quick but I'd shoot for Christmas time,
12 New Years. We'd have to have expedited responses to document
13 demands and things like that and get a deposition --

14 **THE COURT:** But if that involves deposing people in
15 foreign countries, how do you do that expedited and how do you
16 do it at Christmas time?

17 **MR. FLOYD:** If everybody works together. I flew --
18 I've flown multiple times in the past week; I'm sure counsel
19 has as well. You get where you need to be and sometimes family
20 gets to see you at Christmas. It happened two years ago for
21 me. We can make it happen quickly , your Honor.

22 **THE COURT:** Okay.

23 **MR. HART:** We would -- if that discovery were being
24 allowed, we would prefer to compress it into 30 days and get
25 all the discovery completed in 30 days. If they want a

1 deposition, if they want documents, we would propound discovery
2 requests also. We can envision they can -- deposing their
3 witness or witnesses as well, and should be in time to get
4 documents from them as well. If that were going to happen,
5 your Honor. And we would want to aim for getting that all
6 completed within 30 days. I understand that's a tall order,
7 call for a lot of work but to all this ship under attachment
8 while they conduct discovery is a tall order. It's a big deal.

9 **THE COURT:** I understand that. I understand it's
10 touch and it's tough on both sides.

11 Mr. Floyd, can you do it in 30 days?

12 **MR. FLOYD:** What is today, the 13th? I think to get
13 things just up and running, I'd look for -- if we're at a
14 point, your Honor, where we could all agree to limited scope
15 discovery on an expedited basis and not monkeying around with
16 any unreasonable responses to documents (indisc.) and things
17 like that and a witness was going to be made available, I'd say
18 I would propose five weeks respectfully. It's a little bit
19 over 30 days but 35, 36. If that's what it takes then get that
20 done.

21 **THE COURT:** Okay. I'm going to do this then.

22 Because I understand that the defendant is not
23 agreeing that discovery should take place but if the two of you
24 agree, the two of you agree on a period of time of five weeks
25 or whatever it is that you agree to, you could just -- all you

1 have to do is email me and I'll just issue an order to that
2 effect, or you can present a proposed order as long as it's
3 agreed to. Otherwise I think maybe I'll -- if you're not going
4 to do that, I'll have to look at the issues.

5 **MR. FLOYD:** In that case can we consider that, your
6 Honor?

7 **THE COURT:** Absolutely.

8 **MR. FLOYD:** I'm unsure of whether --

9 **THE COURT:** Because I can't tell you.

10 **MR. FLOYD:** What we're saying today is that we are
11 asking the court not to order--

12 **THE COURT:** Right, I understand that. I understand
13 that.

14 Okay. Nobody is asking for additional briefing time
15 I take it.

16 **MR. SPEAKER:** No, your Honor.

17 **THE COURT:** Okay. All right. And I'm sorry that
18 these are the realities but they are.

19 **MR. FLOYD:** If there were any particular issue or
20 question that the court had, that the court would like to have
21 addressed in a brief, of course we would like to do what is
22 helpful to the court.

23 **THE COURT:** No, I think it's all in there, the
24 problem is it's just buried.

25 **(Laughter)**

1 **MR. SPEAKER:** Your Honor, if I could just one side
2 comment?

3 **THE COURT:** Yes, sir.

4 **MR. SPEAKER:** I know the issue was the other motion
5 like custodial or deposit motion came on up. We have not yet
6 responded to that. That was filed not too long ago. I just
7 wanted to clarify that because that is a pending open motion
8 not yet submitted to the court.

9 **THE COURT:** Right. But you wanted to clarify that it
10 was not yet submitted to the court?

11 **MR. SPEAKER:** That we haven't put in our papers yet,
12 your Honor.

13 **THE COURT:** Right, right. And you can respond to
14 anything that Mr. Buchannan said.

15 All right. Is there anything else? From anybody?

16 **MR. SPEAKER:** Thank you very much for your time
17 today, your Honor.

18 **THE COURT:** All righty. Thank you.

19 **(Proceeding adjourned at 4:56 p.m.)**

20 (Adjourned at 4:56 p.m.)

21 (No audible response).

22

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25

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written over a horizontal line.

Signed

December 12, 2019

Dated

TONI HUDSON, TRANSCRIBER